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NATIONAL LABOR RELATIONS POLICY: ATTUNING IT TO UNIONS WITHIN REASONABLE LIMITS

Jay J. Levit*

IN the National Labor Relations Act it is the stated policy of the United States to encourage the collective bargaining process. This article submits that in order to effectuate such a policy, a recognition of the nature and basic need of the union in a procedure involving three parties is vital.

I. THE THREE-PARTY COLLECTIVE BARGAINING PROCESS

Generally, organized labor relations involve three interested parties—employer, employee, and union.¹ Sometimes there is a tendency to draw a line of demarcation between management and union, it being seemingly but deceptively implicit that the employees involved are included in the concept of “union” since the union is their bargaining representative. One may also unwittingly limit his perspective of labor relations by speaking in two-party terms such as “companies and unions,” “labor-management,” or similar phrases.

Organized labor relations cannot be intelligently viewed from the standpoint of company-union only, because individual employees, whether members of the union or not, may well have basic interests different from or even in conflict with legitimate interests that the union has as a union. This is an everyday, working fact of industrial relations life quite apparent to those company personnel men, industrial relations departments, and union officers having “savvy.” The distinction between employees as employees (whether they be union members or not) and unions as unions is not one of mere theoretical significance, but is a distinction having a practical importance dictated by the express, stated labor relations policy of the United States Government.

Congress’ statement of the policy of the United States, the exegesis

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¹ See, e.g., *Scofield v. N.L.R.B.*, 394 U.S. 423 (1969). The Court recognizes that there are “. . . three participants in the labor-management relation: employer, employee, and union.” *Id.* at 431.

of which is the purpose of this article, first appeared in the original National Labor Relations Act of 1935 (Wagner Act),² and is still the stated policy of this country. The vital and final portion of this statement of policy declares:

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.³

Employees may, of course, attempt to bargain collectively with their employer in a variety of ways, *e.g.*, by designating a fellow employee as their spokesman or perhaps by designating a committee of fellow employees to meet with management. However, workers usually bargain on a collective basis with their employer by choosing a labor organization, a "union," as their bargaining representative. Unions are what the National Labor Relations Act⁴ is all about. As a practical matter, without a union there usually can be no effective collective bargaining today. It follows, therefore, that United States policy encouraging the collective bargaining process must, to be effective, be applied within reasonable limits in recognition of the nature and basic need of any union.

What is the nature and basic need of a union? The answer is quite apparent and for this reason one may tend to overlook it. The nature of a union is the same as that of any business in the competitive marketplace. The union's basic need is, of course, to survive as a union. Survival is also the basic need of a business. If a company does not produce a product that is competitive in the marketplace, it will fail. Employees are the union's marketplace. If it does not attract and keep a sufficient number of employees as members, it will fail as a union. If a union does not obtain competitive wages, hours, and working conditions for the employees it represents, it will ultimately fail. In short, unions are a business. The line of demarcation between management and union is

² National Labor Relations Act §§ 1-16, ch. 372, 49 Stat. 449-57 (1935), *as amended*, 29 U.S.C. §§ 151-68 (1964) [hereinafter cited as NLRA].

³ 29 U.S.C. § 151 (1964).

⁴ 29 U.S.C. § 151-68 (1964).

really between two businesses, both competing in the marketplace.

It is not contended in this article that organized labor is to be given any preferred position by labor relations legislation. Indeed, although the Wagner Act of 1935⁵ originally specified only employer unfair labor practices, the National Labor Relations Act of today, as amended by the Labor Management Relations Act of 1947 (Taft-Hartley Act),⁶ contains specified union unfair labor practices as well. Further, one certainly must take into account the Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act),⁷ which places broad administrative controls (primarily through the Secretary of Labor) over certain union activities and incorporates a "Bill of Rights" for individual union members.

It is contended, however, that in the broad collective bargaining process which the United States Government encourages, it is vital, in order to effectively resolve conflicts inherent in the management-union-employee relationship, to recognize (1) that the union may have legitimate interests separate and distinct from those of the individual employees, whether they be union members or not, and (2) that certain management-union-employee conflicts may have to be resolved in the union's favor if the principle of collective bargaining is to be preserved. Three illustrative areas will be considered to explore this argument.

II. ILLUSTRATIVE AREAS

A. *Grievance-Arbitration Procedure*

In *Republic Steel Corporation v. Maddox*,⁸ Maddox, a union member, sued his employer, Republic, in a state court for severance pay which he claimed was due him by virtue of his layoff and the collective bargaining agreement entered into between Republic and his union. The collective bargaining agreement called for severance pay if the layoff was the result of a decision (which it was) to "permanently" close the mine at which Maddox worked. Maddox did not first attempt to utilize the grievance and arbitration procedure, set forth in the collective bargaining contract, before bringing his lawsuit.

⁵ See NLRA, §§ 1-16, ch. 372, 49 Stat. 449-57 (1935), as amended, 29 U.S.C. §§ 151-68 (1964).

⁶ Labor-Management Relations Act §§ 1-503, ch. 120, 61 Stat. 136-62 (1947), as amended, 29 U.S.C. §§ 141-87 (1964).

⁷ Pub. L. No. 86-257, 73 Stat. 519 (1959) (codified in 29 U.S.C. §§ 401-531 (1964) and other scattered sections of 29 U.S.C.).

⁸ 379 U.S. 650 (1965).

The majority of the Court (Justice Black dissenting), speaking through Justice Harlan, held that Maddox could not bring such a lawsuit without first attempting to utilize the collective bargaining contract's grievance process. The Court stated that "as a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress."⁹ The opinion in *Moore v. Illinois Central R. Co.*,¹⁰ written by Justice Black and permitting a trainman to bring a lawsuit for wrongful discharge before exhausting administrative remedies granted by the Railway Labor Act, was initially distinguished on the ground ". . . of permissive language in the Act—disputes 'may be referred . . . to the . . . Adjustment Board. . . .'"¹¹

But the vital point is that in *Maddox* the Court, as it should have done, acknowledged at the outset the union's inherent needs as a union, and recognized the necessity of so doing in order to preserve the collective bargaining process. Thus, while noting management's interest in limiting the choice of remedies available to an aggrieved employee, and the general adequacy of contract grievance procedures to protect the individual employee's interest, the Court stated:

Union interest in prosecuting employer grievances is clear. Such activity complements the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract. In addition, conscientious handling of grievance claims will enhance the union's prestige with employees.¹²

It has, however, been asserted that the NLRB is a "poacher" on the "arbitral domain," and that the exhaustion of contract remedies principle in *Maddox* should be extended ". . . to the collective bargaining representative and to the employer. . . ." ¹³ Two given examples of so-called "poaching" by the NLRB, when analyzed, reveal, to the contrary, that the Board is merely recognizing the union's legitimate interest as a union, which is vital in order to maintain an effective collective bargaining process.

⁹ *Id.* at 652.

¹⁰ 312 U.S. 630 (1941).

¹¹ 379 U.S. at 654.

¹² *Id.* at 653. But see the Court's remarks in note 24 *infra*.

¹³ Cohen, *NLRB: Poacher on the Arbitral Domain*, 55 A.B.A.J. 437, 440 (1969).

In *W. P. Ihrie & Sons, Division of Sunshine Biscuits, Inc.*,¹⁴ the collective bargaining agreement contained a "union shop"¹⁵ provision and a "check-off" provision pursuant to which the employer deducted union dues from the wages of those employees authorizing such deduction, and remitted the dues to the union. The collective bargaining contract's "union shop" clause was revoked by the employees as the result of a deauthorization election,¹⁶ but none of the employees attempted to resign from the union, nor did any employee seek to revoke his dues check-off authorization. Management, however, apparently seized upon what it believed to be a golden opportunity to rid itself of the union, and unilaterally refused to honor the dues check-off provision. The employer advised the union that it deemed the deauthorization vote a justification for its unilateral action, and went even further in its attack upon the union by refunding to the employees the union dues then being held by the employer.

Neither management nor union sought to invoke the contract's grievance-arbitration procedure, and the union filed unfair labor practice charges against the employer because of the unilateral action taken by management. It is difficult to comprehend, but under all of these circumstances the NLRB's trial examiner somehow concluded in part that the "entire matter involves something less than basic to the collective bargaining relationship, and lends itself more properly to the kind of particularized and individual adjustments which an arbitrator is in a position to make, by applying his sound judgment and sense of equity in interpreting the contract. . . ."¹⁷ The trial examiner recommended that the union's complaint before the Board be dismissed, but the Board ruled otherwise and held as follows:

The issue presented as a result of Respondent's conduct is the effect under the (National Labor Relations) Act of an affirmative deauthorization vote upon a contractual dues-check-off obligation of an employer; it relates directly to the employer's statutory duty and is one which the Board is specially competent to resolve. . . . In this case, the employer repudiated the check-off provision of its collective bargaining contract with the Union, not only in its application to employees

¹⁴ [1967 CCH NLRB ¶ 21,432] 165 NLRB No. 2 [hereinafter cited as 165 NLRB No. 2].

¹⁵ A union shop provision requires an applicant for employment to join the union after he is hired, and usually requires him to maintain his membership thereafter.

¹⁶ 29 U.S.C. § 159(e) (1964).

¹⁷ 165 NLRB No. 2 at p. 27,940.

who might not have wished to revoke their existing authorizations, but in its application generally as a continuing contractual provision which allowed new employees voluntarily to authorize this mode of paying their dues. It follows, and we find, that the Respondent thereby unilaterally modified its contract with the Union in violation of Section 8 (a) (5) and (1) of the Act. . . .¹⁸

Clearly, the employer's action in *W. P. Ibrie* was designed not only to strip the union of its finances, but also to encourage its members to resign (which they had not theretofore done). Such action by management plainly constitutes unfair labor practice on its part, with the objective of destroying the union and hence the collective bargaining process. To insist that arbitration is appropriate in this situation, rather than NLRB determination, is absurd. If it be argued by some that federal policy dictates exhaustion of the grievance-arbitration procedure, it should also be borne in mind that in matters such as the one presented in *W. P. Ibrie*, where the conduct complained of thrusts at the very existence of the union as a union and thus threatens the collective bargaining process, the NLRB is indeed "specially competent" to make the appropriate determination. This is why Section 10 (a) of the National Labor Relations Act,¹⁹ empowering the Board to prevent unfair labor practices, states in part that "this power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. . . ."

So, too, the same rationale must apply to the facts presented in the case of *Producers Grain Corporation*,²⁰ where management discharged an employee who had been instrumental in unionizing the employer's operation. The discharged employee was also president of the local union and a member of its grievance committee. The collective bargaining contract contained a grievance-arbitration procedure, and during the life of the contract the discharged employee was a prime mover in the processing of other employees' grievances concerning their conditions of employment. (In this connection, the Court's statement in *Republic Steel Corporation v. Maddox*, that "... conscientious handling of grievance claims will enhance the union's prestige with employees . . .,"²¹ is significant.) The discharged employee at one time had

¹⁸ *Id.* at p. 27,941.

¹⁹ 29 U.S.C. § 160 (a) (1964).

²⁰ [1968 CCH NLRB ¶ 22,103] 169 NLRB No. 68 [hereinafter cited as 169 NLRB No. 68].

²¹ 379 U.S. at 653.

been told by the employer's superintendent that "you are going to grieve yourself out of a job." The employer's sickness rule stated that employees absent due to sickness had to furnish a doctor's certificate. However, in the past management had not strictly enforced this rule, but it seized upon the opportunity to strictly enforce it upon this key employee and discharged him ostensibly because he returned to work after a brief illness without a doctor's certificate. (He had in fact consulted a physician and his wife had notified the employer of his illness.) The discharged employee's grievance was processed through the contract's grievance procedure, to no avail for him, when the union decided to forego the arbitration procedure and filed on his behalf unfair labor practice charges against the employer.

The NLRB's trial examiner concluded that "the discharge was the result of (management's) seizing upon the occasion of the employee's illness and the reason given that the employee had failed to secure a doctor's certificate was pretextual, violating Section 8 (a) (3) of the Act."²² Nevertheless, the trial examiner then incomprehensibly recommended that the NLRB hold its decision in abeyance pending binding arbitration of the dispute. But the Board wisely ruled as follows:

In a situation such as this, where there has been no actual submission to arbitration, where the unfair labor practice issue has already been fully litigated and is before the NLRB for decision, and where the case involves no issue which only an arbitrator would be competent to determine, it would not effectuate the statutory policy to defer this case for arbitration.²³

Again, it is submitted that in a case such as *Producers Grain Corporation*, where the employer's conduct constitutes a serious statutory violation and penetrates the very heart of the collective bargaining process, the union should be free to forego not only the arbitration procedure, but the grievance procedure as well, if it so chooses. The union should be free to seek the special competence of the Board in matters of this kind, and Section 10 (a)²⁴ of the National Labor Relations Act so provides the way.

²² 169 NLRB No. 68 at p. 29,096.

²³ *Id.*

²⁴ 29 U.S.C. § 160(a) (1964). The following statement of the United States Supreme Court in *Scofield* is noteworthy in connection with § 10 (a) and the *Maddox*, *W.I. Ibric* and *Producers Grain* decisions: "In both *Skura* and *Marine Workers*, the Board was concerned with union rules requiring a member to exhaust union remedies before filing an unfair labor practice charge with the Board. That rule, in the Board

B. Enforcement of Union Rules and Regulations

Two United States Supreme Court cases, *N.L.R.B. v. Allis-Chalmers Mfg. Co.*,²⁵ and *Scofield v. N.L.R.B.*,²⁶ demonstrate quite well that certain legitimate union interests are separate and distinct from basic individual employee interests, and that these union interests must be upheld if the national labor policy of encouraging the collective bargaining process is to be effective. It is the effective maintenance of this national policy vis-à-vis the individual employee's right to refrain from "concerted activities" that is under examination here.

In the more recent *Scofield* case, the union had a rule placing a ceiling on the production for which union members could accept immediate piecework pay. Wages due for production by union members over the ceiling were to be "banked" or retained by the employer and paid out to the employee for days on which the employee did not reach the production ceiling. The employer had never agreed with the union to refuse an employee, upon demand, immediate pay for work done over the production ceiling, but the union, under its rule, would assess such a recalcitrant member with a one dollar fine for each violation, and in cases of repeated violation the member would be fined up to one hundred dollars for "conduct unbecoming a union member." A "machine rate" of hourly pay was defined and guaranteed to the employees by the collective bargaining contract. An industrious employee could produce faster than the machine rate and thus earn more, but if he were a union member, he would be subject to the union rule's banking procedures. Both the employer and the union bargained over the ceiling rate in the union's rule, and the union did agree to increase the rate during bargaining sessions. The employer cooperated with the union by making its work records available for union inspection to check compliance by union members with the

view, frustrated the enforcement scheme established by the statute and the union would commit an unfair labor practice by fining or expelling members who violated the rule.

The *Marine Workers* case came here and the result reached by the Board was sustained, the Court agreeing that the rule in question was contrary to the plain policy of the Act to keep employees completely free from coercion against making complaints to the Board. Frustrating this policy was beyond the legitimate interest of the labor organization, at least where the member's complaint concerned conduct of the employer as well as the union." *Scofield v. N.L.R.B.*, 394 U.S. 423, 429-30 (1969).

²⁵ 388 U.S. 175 (1967).

²⁶ 394 U.S. 423 (1969).

union rule's ceiling rate, and the employer "banked" money for those union members complying with the union's rule.

Some of the union's members, however, demanded immediate payment from the employer for production over the ceiling rate, and the employer complied. Thereafter, these employees were suspended from the union, by the union's membership, for one year and were fined fifty to one hundred dollars. The recalcitrant union members refused to pay the fines, so the union sued them in a state court to collect the fines as a matter of contract law, and the fined members then filed unfair labor practice charges against the union. They claimed that by seeking to enforce its imposition of fines on them, the union was restraining or coercing them in violation of Section 8 (b) (1) (A)²⁷ by impairing their Section 7²⁸ right to refrain from participation in "concerted activities." The Board's trial examiner found no unfair labor practices, however, and the Supreme Court affirmed the Board's adoption of his findings.

At the outset, the Court noted the absence of any evidence to show that the union fines were unreasonable or arbitrarily imposed. Nor was there any showing that the fined members' union membership was involuntary. Further, the Court noted that the union rule in question was enforced by the union through the acceptable, internal²⁹ means of union fines collected by threat of expulsion from the union or judicial action. The Court thus reached the very heart of the matter, stating that its "... inquiry must therefore focus on the legitimacy of the union interest vindicated by the rule and the extent to which any policy of the (National Labor Relations) Act may be violated by the union-imposed production ceiling."^{29a} From this point on it was relatively easy for the Court's rationale to flow as follows:

... [U]nion opposition to unlimited piecework pay systems is historic. Union apprehension, not without foundation, is that such systems will drive up employee productivity and in turn create pressures to lower the piecework rate so that at the new, higher level of output employees are earning little more than they did before. ... The view of the trial examiner was that "[i]n terms of a union's traditional function of trying to serve the economic interests of the group as a

²⁷ 29 U.S.C. § 158(b)(1)(A) (1964).

²⁸ 29 U.S.C. § 157 (1964).

²⁹ That is, the union did not use the generally unacceptable external means of "... inducing the employer to use the emoluments of the job to enforce the union's rules." *Scofield v. N.L.R.B.*, 394 U.S. 423, 429 (1969).

^{29a} *Id.* at 431. See also the Court's remarks in *Scofield*, *supra* note 24.

whole, the union has a very real, immediate, and direct interest in it. . . ." ³⁰

The Court observed ". . . that the union rule in question here affects the interests of all three participants in the labor-management relation: employer, employee, and union." ³¹ And, the Court also noted, "although the enforcement of the rule is handled as an internal union matter, the rule has and was intended to have an impact beyond the confines of the union organization. . . . But . . . it does not follow from this that the enforcement of the rule violates Section 8 (b) (1) (A), unless some impairment of statutory labor policy can be shown." ³² Therefore, the Court reasoned, although "the principal contention of the petitioner is that the (union) rule impedes collective bargaining, a process nurtured in many ways by the Act . . . , we discern no basis in the statutory policy encouraging collective bargaining for giving the employer a better bargain than he has been able to strike at the bargaining table." ³³

It was also concluded by the Court that the union rule in question did not violate the collective bargaining contract, nor did those union members who complied with it. Further, the Court held that the union rule did not improperly discriminate between union and non-union members in favor of non-members.

All members of the bargaining unit . . . have the same contractual rights. In dealing with the employer as bargaining agent, the union has accorded all employees uniform treatment. If members are prevented from taking advantage of their contractual rights bargained for all employees it is because they have chosen to become and remain union members. . . . If a member chooses not to engage in this concerted activity and is unable to prevail on the other members to change the rule, then he may leave the union [T]he union has not induced the employer to discriminate against the member but has merely forbidden the member to take advantage of benefits which the employer stands willing to confer. ³⁴

It is interesting to note that in *Scofield* Justice Black dissented for the same reason he had previously done so in *N.L.R.B. v. Allis-Chal-*

³⁰ *Id.* at 431.

³¹ *Id.*

³² *Id.* at 432.

³³ *Id.*

³⁴ *Id.* at 435.

*mers Mfg. Co.*³⁵ In *Scofield*, however, he alone dissented (Justice Marshall did not participate in the case), whereas in *Allis-Chalmers* he had been joined in his dissent by Justices Douglas, Harlan, and Stewart. Justice White, who wrote a concurring opinion in *Allis-Chalmers*, wrote the majority opinion in *Scofield*. Because the Court in *Scofield* relied almost exclusively on the rationale of its majority opinion in *Allis-Chalmers*, two things in particular must be noted from that case. (*Allis-Chalmers* upheld the union's action in fining those of its members who crossed a picket line during a valid economic strike called by the union. Further, the Court upheld the union's right to secure payment of the fines by suing its recalcitrant members in state court. The Court recognized that "... the power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent. . . ." ³⁶) First, the Court in *Allis-Chalmers* specifically took cognizance of the regulation of unions by and the "Bill of Rights" for union members under the Landrum-Griffin Act, but secondly, found this legislation to be no barrier to the following exposition of national labor policy given by the Court:

National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees. "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents. . . ." *Steele v. L. & N. R. Co.*, 323 U.S. 192, 202. Thus, only the union may contract the employee's terms and conditions of employment, and provisions for processing his grievances; the union may even bargain away his right to strike during the contract term, and his right to refuse to cross a lawful picket line. The employee may disagree with many of the union decisions but is bound by them. "The majority-rule concept is today unquestionably at the center of our federal labor policy." ³⁷ "The complete satisfaction of all who are represented is hardly to be expected.

³⁵ 388 U.S. 175 (1967).

³⁶ *Id.* at 181.

³⁷ But see the United States Supreme Court's remarks in *Brooks v. N.L.R.B.*, *infra* note 57.

A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338.³⁸

C. Authorization Cards

The general rule is that when the union demands recognition solely on the basis of authorization cards signed by a majority of the employees, management may properly refuse to recognize the union as the employees' exclusive bargaining representative if there is a good faith doubt on management's part that the union in fact has been chosen by the employees to be their collective bargaining agent.³⁹ What constitutes a good faith doubt depends upon the circumstances of each case, but if the employer refuses recognition in bad faith, the NLRB may find that he is wrongfully refusing to bargain with the union in violation of Section 8 (a) (5), and may order him to bargain with the union in good faith, even in the situation where a representation election has been held and the union has lost.⁴⁰

Most federal courts of appeal have upheld and enforced such NLRB bargaining orders, but the United States Court of Appeals for the Fourth Circuit has apparently taken a position blatantly in conflict with that of the NLRB and most other circuits. As this article is being written, the Fourth Circuit's minority position,⁴¹ along with the majority view as represented by the First Circuit,⁴² is being considered by the United States Supreme Court.⁴³ It is submitted that unless the Supreme Court sidesteps the broad issue raised by the Fourth Circuit, and instead decides the cases before it on narrower grounds, the majority view should be affirmed and the Fourth Circuit's view rejected because it conflicts with the national labor policy of encouraging the collective bargaining process. The cases before the Supreme Court at this writing (*Sinclair* and *Gissel*) constitute the subject of discussion here.

In *N.L.R.B. v. Sinclair Co.*,⁴⁴ the union gave notice to the employer

³⁸ 388 U.S. at 180.

³⁹ See, e.g., *Snow, d.b.a. Snow & Sons v. N.L.R.B.*, 308 F.2d 687 (9th Cir. 1962); *Joy Silk Mills v. N.L.R.B.*, 185 F.2d 732 (D.C. Cir. 1950).

⁴⁰ *Joy Silk Mills v. N.L.R.B.*, 185 F.2d 732 (D.C. Cir. 1950).

⁴¹ *N.L.R.B. v. Gissel Packing Co., Inc. and Food Store Employees Union, Local 347, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Intervenor*, 398 F.2d 336 (4th Cir. 1968).

⁴² *N.L.R.B. v. Sinclair Co.*, 397 F.2d 157 (1st Cir. 1968).

⁴³ *N.L.R.B. v. Gissel, cert. granted and cases consolidated*, 395 U.S. 575 (1969).

⁴⁴ 397 F.2d 157 (1st Cir. 1968).

that it represented a majority of the employees and requested management to bargain with it. The union offered to submit signed authorization cards for authentication of the union's claimed status of bargaining representative, but the employer simply refused to recognize the union. The union then filed a representation petition with the NLRB; both management and union stipulated to a Board conducted election among the employees involved; the election was held and the union lost by one vote. The union then filed unfair labor practice charges against management and petitioned to have the Board set aside the election. The Board did so and entered an unfair labor practice bargaining order against the employer, and petitioned the United States Court of Appeals, First Circuit, for enforcement of its bargaining order.

The court affirmed the NLRB's bargaining order, stating that the employer had committed pre-election unfair labor practices as the Board had found, and that "substantial evidence"⁴⁵ had been presented to the Board to support its finding that "instead of recognizing the union on the basis of its admitted card majority the company insisted on an election . . . in order to gain time in which to dissipate the union's majority."⁴⁶ Accordingly, the court ruled, "in view of the company's unlawful interference with the employees' rights during the pre-election campaign, we think the Board acted within its discretion in setting aside the election and in ordering the company to bargain."⁴⁷ The court specifically rejected the employer's contention that authorization cards are not reliable in ascertaining the union's majority status, saying:

Actually what the company is contending here is that signed authorization cards are so unreliable that it has a right to reject a request for recognition based on them and insist upon an election. We have already rejected this proposition in this circuit. . . .

In the instant case there is undisputed evidence of the union's majority status long prior to the election. It is reasonable to conclude that this status was dissipated by the company's unlawful interference with the employees' Section 7 rights, thus tainting the . . . election. In these circumstances we think the Board was warranted in entering a bargaining order rather than ordering a new election.⁴⁸

⁴⁵ 29 U.S.C. §160(e) (1964). Cf. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 (1951).

⁴⁶ *N.L.R.B. v. Sinclair Co.*, 397 F.2d 157, 161 (1st Cir. 1968).

⁴⁷ *Id.*

⁴⁸ *Id.*

Contrast the foregoing rationale of the First Circuit with that of the Fourth Circuit in *N.L.R.B. v. Gissel Packing Co., Inc.*,⁴⁹ where the court, after finding that there was "substantial evidence" to support the Board's finding that management had engaged in serious, unlawful pre-election conduct, coercing the employees and otherwise violating their rights, nevertheless stated that the employer had not unlawfully refused to bargain with the union on the basis of signed authorization cards obtained by the union from employees because:

In recent cases we have had occasion to point out that authorization cards are such unreliable indicators of the desires of the employees that an employer confronted with a demand for recognition based solely upon them is justified in withholding recognition pending the result of a certification election.⁵⁰

Actually, the ground upon which the Fourth Circuit appears to tread in such confidence is really not so steady. Witness, for example, the court's remark in *N.L.R.B. v. Heck's, Inc.*,⁵¹ that "this is not one of those extraordinary cases in which a bargaining order might be an appropriate remedy for pervasive violations of Section 8 (a) (1)." So, too, this very same court in *N.L.R.B. v. Sehon Stevenson & Co., Inc.*⁵² upheld the Board's bargaining order on the basis of authorization cards obtained by the union because "when the employer has conducted his own investigation, the results of which confirm the union's claim, we think it reliably establishes the union's majority and the employer's lack of any good faith doubt of it." And again, this same United States Court of Appeals for the Fourth Circuit, in *N.L.R.B. v. S. S. Logan Packing Co.*,⁵³ admits:

It has always been true, too, that the duty to bargain is not dependent upon a Board certification under Section 9 (c). An employer believing an independent union represents a majority, may recognize it. . . . The duty to bargain follows from recognition. Without recognition, it arises if recognition is wrongfully withheld when the union clearly represents a majority of the employees and the employer has no doubt of it, and in such a case there is no question of representation for the Board to resolve (by conducting an election). The duty

⁴⁹ 398 F.2d 336 (4th Cir. 1968).

⁵⁰ *Id.* at 337.

⁵¹ 398 F.2d 337 (4th Cir. 1968).

⁵² 386 F.2d 551 (4th Cir. 1967).

⁵³ 386 F.2d 562 (4th Cir. 1967).

to extend recognition and to bargain when there is no question concerning representation is settled under the (National Labor Relations) Act in its present form as it was under the original Wagner Act.⁵⁴

Indeed, the United States Supreme Court years ago acknowledged:

Section 8 (a) (5) declares it to be an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a). . . ." Section 9 (a), which deals expressly with employee representation, says nothing as to how the employees' representative shall be chosen. . . . It does not make it a condition that the representative . . . shall be certified by the Board, or even be eligible for such certification.⁵⁵

The Fourth Circuit's blatant assertion in *Gissel* that authorization cards are so unreliable as to ipso facto justify an employer's withholding recognition when the union's demand for such is based solely on them, is thus contradicted not only by prior United States Supreme Court decisions, but also by other decisions in the Fourth Circuit, as well as by the plain language of the National Labor Relations Act. The difficulty that the Fourth Circuit seems to be having, it is submitted, stems from its failure in this area to appreciate the overall national labor policy of encouraging the collective bargaining process. Notwithstanding precedent and clear statutory language, the Fourth Circuit has, in effect, taken the position in *Gissel* that employees are too incompetent to intelligently designate, via signed authorization cards, a union as their collective bargaining agent, and that unions will not obtain such cards in a fair manner. But the court noticeably does not "judicially notice" that management rarely wishes to recognize a union, "good faith doubt" or not, and that management almost always welcomes an opportunity to dissipate the union's validly attained majority status by insisting that an election first be held.

The Fourth Circuit's rationale in *Gissel* simply refuses to acknowledge the employees' Section 7 right to organize themselves without first voting in a formal election. It simply refuses to recognize that this is the way unions function, the way they organize. It is a very basic, democratic way of organizing, and acknowledges the individual employee's competency to sign or refuse to sign an authorization card. If the union abuses its right to attempt to organize the employees, such

⁵⁴ *Id.* at 569.

⁵⁵ *Mine Workers v. Arkansas Flooring Co.*, 351 U.S. 62, 71 (1956).

as by misrepresentation or coercion, then the NLRB is specially equipped to remedy the situation.⁵⁶ So, too, if management's motives in refusing to recognize the union are unlawful, and the Board so finds on the basis of substantial evidence presented to it, then the courts have a duty to recognize the Board's expertise in labor relations and hence to enforce its remedial orders, including bargaining orders.⁵⁷ Certainly Judge Sobeloff's conclusion in his concurring opinion in *N.L.R.B. v. Sehon Stevenson & Co., Inc.*,⁵⁸ is the sensible approach with respect to authorization cards:

Their validity may not be judged without investigation into the particular card employed and the overall atmosphere in which signatures were procured. When textually unambiguous and secured without fraud or coercion, cards may be a reliable indicator of employees' union desires. More importantly, where employer unfair labor practices have destroyed the possibility of a valid election, a card majority is the only reliable guide to the wishes of the employees.⁵⁹

⁵⁶ 29 U.S.C. § 160 (1964). See, e.g., *Englewood Lumber Co.*, 130 N.L.R.B. 394 (1961). *Walker Process Equipment, Inc.*, [1967 CCH NLRB ¶ 21,218] 163 NLRB No. 78.

⁵⁷ 29 U.S.C. § 160 (1964). During its discussion of matters "... appropriately determined by the Board's administrative authority," the Court stated. "... [W]e (have) held that where a union's majority was dissipated after an employer's unfair labor practice in refusing to bargain, the Board could appropriately find that such conduct had undermined the prestige of the union and require the employer to bargain with it for a reasonable period despite the loss of majority. . . . (and) we (have) held that a claim of an intervening loss of majority was no defense to a proceeding for enforcement of an order to cease and desist from certain unfair labor practices." *Brooks v. N.L.R.B.*, 348 U.S. 96, 102 (1954).

⁵⁸ 386 F.2d 551 (4th Cir. 1967).

⁵⁹ Judge Sobeloff's cogent concurring opinion further observes that "the fact is that the only statistical study of cards, upon which the (Fourth Circuit majority in) the *Logan* opinion relies heavily, concludes: '[A]uthorization cards do have validity.'" *Id.* at 554-55. And noting Professor Pollitt's study of NLRB re-run elections, Judge Sobeloff points out: "Premising his observation on 20,153 elections held between 1960 and 1962. [sic] Pollitt concludes that in over two-thirds of the cases, the party who destroyed the election process in the first instance wins in the re-run." *Id.* at 556. Hence, we have the Board's wisdom in issuing an 8(a)(5) bargaining order rather than conducting a re-run election. Finally, Judge Sobeloff states: "'Crocodile tears' shed by an employer over the loss of his employees' free and untrammelled choice after he has violated either section 8(a)(1) or (3) or both should not impress us. Nor do I share my brethren's concern that the employees may end up being represented by a minority union. In the first place, this is not a statistical probability as evidenced by the figures cited in *Logan*. Secondly, the Supreme Court has made it clear that there are other values—such as the need to deter employer unfair practices—in our labor policy which may on occasion override the desideratum of majority representation (citing cases). Finally, a minority union facing a hostile employer can cause the employees little harm while having strong incentive to do them much good" (citing Professor Bok). *Id.* at 557.

The United States Supreme Court should reaffirm the reasoning in Judge Sobeloff's opinion.*

CONCLUSION

The purpose of this article has been to show that the stated policy of the United States to encourage the procedure of collective bargaining is not a mere remark prefatory in nature, having little substance. Quite to the contrary, it is a pithy statement of national labor policy demanding a keen insight into the basic, inner workings of organized labor relations. Whenever those who have the awesome duty to uphold this policy lack the requisite insight, or fail to appreciate the inherent nature and basic need of the union *as a union*, then the maintenance of the national policy is threatened, and our security in an effective collective bargaining process is impaired.

* *Editor's Note.*

After this article was submitted and about to go to press, the United States Supreme Court's decision concerning the validity and effect of authorization cards came down. *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575 (1969). The Court, speaking through Chief Justice Warren, unanimously held in pertinent part that (1) the duty to bargain can arise without a Board election under the National Labor Relations Act; (2) union authorization cards, if obtained from a majority of employees without representation or coercion, are reliable enough generally to provide a valid, alternate route to majority status; and (3) an NLRB bargaining order is an appropriate and authorized remedy where an employer rejects a card majority while at the same time committing unfair labor practices that tend to undermine the union's majority and make a fair election an unlikely possibility. It is noteworthy that the Court reversed the United States Court of Appeals for the Fourth Circuit to the extent that the Fourth Circuit "decline (d) enforcement of the Board's orders to bargain," and affirmed the judgment of the United States Court of Appeals for the First Circuit, as advocated by Mr. Levit in his article. *Id.* at 620. As Mr. Levit suggested might occur, the Court seemingly did sidestep the broad issue raised by the Fourth Circuit, stating that "because the employers' refusal to bargain in each of these cases was accompanied in each instance by independent unfair labor practices which tend to preclude the holding of a fair election, we need not decide whether a bargaining order is ever appropriate in cases where there is no interference with the election processes." *Id.* at 595.

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